In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1960

No. 476

[redacted]

Petitioners,

VERSUS

[redacted] PETROLEUM COMPANY, a Delaware Corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In the

Supreme Court of the United States

OCTOBER TERM 1960

No. 476

W. A. MONCRIEF, JR., and JOE J. KLABZUBA,
Petitioners,

VERSUS,

PASOTEX PETROLEUM COMPANY, a Delaware Corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I

INTRODUCTION

This brief in opposition to the Petition for Certiorari lodged in this Court is submitted in accordance with the provisions of Rule 24. Petitioners will be referred to as such, as plaintiffs, or as Monerief, and the respondent as such, or as defendant, or as Pasotex. Parenthesis references, unless otherwise indicated, will be to the printed transcript filed in the United States Court of Appeals. Emphasis is supplied unless otherwise noted.

On May 13, 1948, *Rosa Drake McCann, a full-blood Chickasaw Indian*, executed an oil and gas lease [illegible] restricted lands allotted to her in the State of Oklahoma. Such lease for its validity was required to be ap-

proved and was approved by the Secretary of the Interior in accordance with the provisions of the Act of 1906, Section 20, 34 Stat. 137; as amended by the Act of 1908, Section 2, 35 Stat. 312, and subsequent amendments. (The pertinent provisions of those Acts appear in Appendices A and B.) Such lease was approved by the Secretary of the Interior on June 12, 1948, *and was for the "term of ten (10) years from and after the approval hereof by the Secretary of the Interior and as long thereafter as oil and or gas is produced in paying quantities from said lands."*

Rosa Drake McCann died on December 22, 1950, seized and possessed of such restricted allotted land. All of her heirs consisted of restricted Indians, and Mary Belle Cooper now Chadwick was such an heir. Restrictions were never removed from this land and on the 27th day of May, 1958, while the Departmental lease above referred to was admittedly in full force and effect and while drilling operations were in process, Mary Belle Cooper now Chadwick *executed an oil and gas lease to petitioners covering the interest in these same lands inherited by such restricted heir that was leased by the Departmental lease and from which restrictions had not been removed or Departmental supervision relinquished and which was under Departmental supervision.* This lease was executed pursuant to the provisions of the Act of 1947, 61 Stat. 732 (Appendix "C"), *which permits a full blood restricted Indian heir* to execute an oil and gas lease covering restricted inherited land with the approval of the County Court in the County in which the land lies; *the execution of a lease under this Act does not require any approval by the Secretary of the Interior and the lease is under no Departmental supervision.*

relief sought requests a remand to the Secretary of the Interior for administrative action and determination.

It is respondent's claim that this cause is one that presents a controversy arising under the laws of the United States. We feel that the claim of no federal question is refuted on the face of the petition itself and it is obvious the controversy in its ultimate outcome poses at most a simple question of title between petitioners and respondent and that this case presents no special and important question of state or federal law not heretofore determined or that should be determined by this Court.

II

QUESTIONS PRESENTED

Under Section III—"Questions Presented"—the questions asked in the petition are not in accord with respondent's understanding of the determinative issues, and it is desirable to clearly point out respondent's conception thereof with its contentions in brief.

As correctly stated by the Court of Appeals, the dispositive issue was:

> "Whether or not under undisputed facts the lessee of an oil and gas lease on restricted Oklahoma Indian land has complied with the lease requirements so as to extend the lease beyond its primary term."

That Court gave an affirmative answer and concluded that it was not necessary to consider when production was obtained or a well completed as the commencement of a

well as the primary term and subsequent productions extended the lease.

The District Court specifically found and determined that oil and gas in paying quantities was encountered in and produced from the Departmental lease prior to the expiration of its primary term and its conclusions show both the commencement and completion of a well producing oil or gas in paying quantities under the terms of the Departmental lease involved and its perpetuation by reason thereof (33, 34, 35). The basic issue asserted by petitioners *that respondent did not have a completed well capable of producing oil or gas in paying quantities at the expiration of the primary term*, we believe has been finally foreclosed in the courts below, both as to fact and as to law (33, 34, 35).

In posing the questions on which a review of this case is sought, petitioners present five questions. In order to avoid any confusion, they are set out immediately followed by our basic contentions with respect to each, viz:

"(1) Is the construction of a Departmental Oil and Gas Lease a 'question arising under the Constitution, laws and treaties of the United States'?"

Answer: As applied to the case at bar and the end sought to be accomplished by this litigation, this case is one of controversy arising under the Constitution, laws and treaties of the United States and federal jurisdiction exists and has been properly invoked.

"(2) If that question is answered in the affirmative, then is the Federal Court bound to construe the lease

by applying only the law of the State where the Court is sitting (as held below) or may the Court apply Federal law?"

Answer: This question is answered by Title 28, U.S.C., Section 1652, which reads:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 646, 62 Stat. 944."

The decision of the Court of Appeals is in strict accord with this statute and the decisions of this Court thereunder.

> "(3) If such a lease is to be construed under Federal law; does it expire in the absence of production at the end of the primary term even though drilling operations have been commenced?".

Answer: This question is beside the point, as the trial court found there was production at the end of the primary term (33, 34, 35), but if there had been no production at the end of the primary term, drilling operations commenced before the expiration of the primary term and then in progress would have continued the lease.

> "(4) Has the Congress delegated to the Secretary of Interior jurisdictional power to determine whether a Departmental Oil and Gas Lease has expired by its own terms?"

Answer: Congress itself has no such power and cannot delegate it.

"(5) If the preceding question is answered in the affirmative, then must the administrative remedy before the Secretary be exhausted before resort is had to a United States District Court?"

Answer: A Departmental oil and gas lease is essentially a contract between the lessor and the lessee. It is a contract that both parties are competent to enter into. The Secretary of the Interior is not a party thereto. Its validity depends, however, upon the approval of the Secretary of the Interior. His authority with respect to the lease after its approval is limited to the terms of the lease. The lease claimed by the petitioners is not a Departmental lease. It is in no way dependent for its validity on approval by the Secretary of the Interior. The Secretary of the Interior has no jurisdiction or supervision or authority over the same whatsoever. This controversy cannot be disposed of by administrative remedy, there being no administrative jurisdiction.

With the exception that the petitioners contended in the District Court and in the Court of Appeals that it was entitled to have production on the Departmental lease involved, consisting of a completed well thereon, with [illegible] equipment for production in tanks, and to have [illegible] to the expiration of the primary term of the lease, [illegible] production precedent to the extension of the primary term [illegible] which contention the lower courts resolved against petitioners on both the facts and law, none of the questions above posed were urged and designated by the petitioners as points relied on in the appeal to the Court of [illegible] (R. 20). Only after petitioners had submitted the case on a different theory of their own choosing on which the

Oklahoma decisions relied on by them were determined to be inapplicable and contrary to what they contended was the law in Oklahoma) and had lost were the other points now urged for the first time (either by petition for rehearing and or petition for certiorari) claimed as a basis for error in the proceedings in the lower courts.

III

STATEMENT OF THE CASE

The statement contained in Section V of the petition is insufficient on which to properly present respondent's position and is in many instances incorrect, and in amplification and in correction thereof, we make this additional statement.

The parties to this suit in the trial court consisted of the restricted heir and the petitioners who claimed under the lease executed by restricted heir, Mary Belle Cooper now Chadwick, and Pasotex Petroleum Company, the lessee, by assignment of the original allottee and the owner of the Departmental lease.

The petitioners filed this suit on August 18, 1958, in the United States District Court for the Eastern District of Oklahoma (2).

The land involved had been allotted to Rosa Drake McCann, a full-blood Choctaw Indian. Restrictions were never removed from said land and she died owning the same. During her life she executed the Departmental lease above referred to and it was approved by the Secretary of the Interior (29).

Departmental supervision has never been relinquished on this lease insofar as it covers the land here involved (30).

Rosa Drake McCann died on December 22, 1959, intestate. All of her heirs consisted of restricted Indians. Mary Belle Cooper now Chadwick was a restricted heir of the allottee and restrictions have never been removed on her interest in this land. Her interest in this land and the Departmental lease is subject to and under Departmental supervision (30).

On the 27th day of May, 1958, while the Departmental lease above referred to was admittedly in full force and effect as to her interest in the restricted land, Mary Belle Cooper now Chadwick sold, through the County Court of Love County, Oklahoma, and thereafter executed an oil and gas lease to petitioners covering the same lands that were covered in the Departmental lease and owned by such restricted heir and from which restrictions have not been removed or any Departmental supervision relinquished (30).

By the institution of this suit petitioners sought to have the lease executed by the restricted heir claimed by them determinated to be superior to the Departmental lease executed by Rosa Drake McCann, the original allottee and to have the title thereto quieted against the rights of Pasotex under the Departmental oil and gas lease. *The lease executed by the full-blood heir under which petitioners assert title was not advertised for sale by nor did any authority exist in the Department of the Interior to author-*

ize or to put any limitations upon the execution of such lease. Such lease did not require Departmental approval nor was it subject to Departmental supervision (Appendix "C"). The statements in the opposition's petition (pages 6-7, 21-22) to the contrary, for example: "the Department had absolute discretion as to whether this new lease should have been advertised for bidding"—are incorrect and are contrary to the facts and the law. They ignore and overlook applicable law controlling the execution of that new lease.

The complaint on its face showed no diversity, but it did show a value of the amount in controversy, exceeding the amount of $10,000.00, exclusive of interest and costs, which was admitted in the pleadings of all parties.

Pasotex, realizing that the matter in controversy was in excess of $10,000.00 and arises under the laws or treaties of the United States, and counsel feeling that under the Rules of Federal Procedure it was incumbent upon it to assert a cross claim or counterclaim and ask for affirmative relief, and realizing that in order for a final judgment to be binding on all necessary or indispensable parties the restricted Indian, Mary Belle Cooper now Chadwick and, through her, the United States, should be brought in, filed before answer date, an application to make Mary Belle Cooper now Chadwick a party (31).

An order granting this motion and making such restricted Indian a party defendant in the action was entered on September 23, 1958 (21). Immediately after Mary Belle Cooper now Chadwick had been made a party defendant and on the 23rd day of September 1958, Pasotex filed its

answer to plaintiffs' complaint and its cross-claim against the plaintiffs and Mary Belle Cooper now Chadwick (18-19, incl.). A notice of the pendency of this suit was duly served on the Area Director, formerly Superintendent of the Five Civilized Tribes (21) pursuant to the Act of April 12, 1926 (44 Stat. 239) and Mary Belle Cooper now Chadwick was likewise personally served as ordered by the court (31, 32).

The answer and cross-claim of the defendant in detail alleges the allotment of the land involved, the death of the full-blood Indian, the restrictions on the land, the execution of the Departmental lease, the fact that restrictions have never been relinquished thereon, the validity thereof with a copy of the Departmental lease attached, and *all elements necessary to invoke federal jurisdiction independent of the petitioners' complaint*, and concludes with the prayer that plaintiffs' suit be dismissed and that defendant have judgment on its cross-claim sustaining the validity of the lease.

The United States did not elect to appear in the cause either for itself or for the restricted Indian, and no appearance was made by the restricted Indian. The case was tried to the court and its Findings of Fact (29-34, incl.), set out in detail the facts which support the federal jurisdiction, as well as the facts which were undisputed and on which it rendered its Conclusions of Law (34, 35, 36) to the effect that the Departmental lease was valid and subsisting and the lease asserted by petitioners was of no force and effect and should be cancelled as a cloud on respondent's title (4-19, incl.).

Judgment was rendered denying petitioners' claim and dismissing the complaint and granting judgment to respondent on the cross-complaint and adjudicating the judgment to be binding upon the United States (36-39, incl.). The trial court specifically found that as a result of operations commenced on said lease as authorized therein, oil and gas in paying quantities was actually produced from said lease prior to the expiration of the primary term and that the term of said lease had been extended by discovery and production of oil and gas in paying quantities (34, 35).

Petitioners appealed to the Court of Appeals and on that appeal directed their claims of error against and limited the same to error in the trial court's determination that the Departmental lease had been extended by the discovery and production of oil and gas as authorized by the lease. It was the claim of petitioners that under the terms of the Departmental lease here involved it was necessary that a well be completed on the land involved and permanently equipped and ready to actually produce through its permanent equipment oil and gas in paying quantities into the pipeline prior to the expiration of the primary term of the lease, that this had not been done and the lease had therefore expired by its terms.

The argument was advanced both in the trial court and in the Court of Appeals that the substantive law of Oklahoma called for this result although the words "complete" or "completion" of a well are not even mentioned in the Departmental lease. On appeal the judgment was affirmed and a petition for certiorari has been lodged by petitioners with the Clerk of this Court.

IV
ARGUMENT AND GROUNDS FOR NOT REVIEWING THIS CAUSE

1. The record conclusively shows existence of a federal question.

When Congress displaced the treaty provisions formerly existing with respect to the Choctaw and other members of the Five Civilized Tribes and provided for the allotment of their lands in severalty, certain restrictions against alienation were retained and the same have been carried forward up until this time in the Act of 1906 (34 Stat. 137), as amended and changed by the Act of 1908 (35 Stat. 312), and by the Act of April 12, 1926 (44 Stat. 239), and as further amended by the Act of August 4, 1947 (61 Stat. 731) and other acts not here material. See Appendix.

In all matters that relate to the alienation of restricted lands or lands of restricted members of such Indian tribes to whom patents in fee have been issued, the government has and continues to assert an interest as guardian and protector of such restricted Indians with respect to their restricted lands. See *Heckman* v. *U. S.*, 224 U.S. 413, 56 L. Ed. 820; *Tiger* v. *Western Investment Co.*, 221 U.S. 286, 55 L. Ed. 738; *Brader* v. *James*, 246 U.S. 88, 62 L. Ed. 591; *Sunderland* v. *U. S.*, 266 U.S. 226, 69 L. Ed. 25; *U. S.* v. *Hellard*, 322 U.S. 363, 88 L. Ed. 1326.

In *Lancaster* v. *Kathleen Oil Co.* (Okla. 1916), 241 U.S. 551, 60 L. Ed. 1161, the United States Supreme Court had under consideration the determination of whether the lessee of an oil and gas mining lease by the heirs of an Indian allottee was valid against a subsequent lease to the

defendant approved by the Secretary of the Interior under the Act of May 27, 1908, and that Court concluded that such controversy presented a federal question.

Again, in *Wellsville Oil Co.* v. *Miller*, 243 U.S. 6, 61 L. Ed. 559, the Supreme Court of the United States in a controversy involving the validity of a lease on an Indian allotment subject to the condition that it be approved by the Secretary of the Interior before becoming operative determined that the case was reviewable as concerning matters inherently federal.

Other cases in point are *Creek Indians Nat'l Council* v. *Sinclair-Prairie Oil Co.*, 142 F.2d 842, *certiorari denied*, 323 U.S. 781, 89 L. Ed. 624; *Jefferson* v. *Gypsy Oil Co.*, 27 F.2d 304; *Roubedeaux* v. *Quaker Oil and Gas Co.* (Okla.), 23 F.2d 277, *certiorari denied*, 276 U.S. 636, 72 L. Ed. 744. Also see *Brown* v. *Stufflebean*, 187 F.2d 347, Tenth Circuit.

Prior to the passage of the Act of April 12, 1926, above referred to, the status of the guardianship of the United States with respect to the restricted lands of members of the Five Civilized Tribes such as are here involved is well stated in an opinion rendered in 1944 where in *Town of Okemah* v. *The United States*, 140 F.2d 963, it is stated:

> "Members of the Five Civilized Tribes who own allotted lands restricted against alienation are under the guardianship of the United States; they are wards of the Nation so far as the alienation of such lands is concerned. During the continuation of such guardianship, it is the right and the duty of the United States to enforce the restrictions designed for the security of the Indians by all appropriate means. The national interest is not to be expressed in terms of property, or

to be limited to the assertion of rights incident to the ownership of a reversion or to the holding of a technical title in trust. It has a governmental interest in the enforcement of the restrictions. It is not essential that it should have a pecuniary interest. Where lands are held by members of the Five Civilized Tribes under patents in fee with restraints on alienation, a decree undertaking the alienation of the Indians' interest in the lands in a suit to which the United States is not a party has no binding effect and the United States may sue to cancel the decree and set aside the conveyance made pursuant thereto. The United States is an indispensable party to any action wherein the relief sought would impair its governmental function to protect the allotted lands against alienation."

That Act was calculated to bring about two main purposes. If a suit was pending in either the United States courts or in a state court which affected property rights of a restricted member of the Five Civilized Tribes, machinery was set up so that the United States and all interested parties might be concluded by one proceeding and the title involved stabilized. See *United States* v. *Rice*, 327 U.S. 742, 90 L. Ed. 982.

The Act of 1926 was not an act vesting any jurisdiction in the federal court but, rather, with respect to jurisdiction with which it was already vested, the purpose of the Act was to specify the procedure by which a final and conclusive judgment could be obtained; and so far as the state court was concerned the United States relinquished its exclusive jurisdiction to the extent specified in the statutes to actions meeting the requirements of the statutes that might be brought or pending in the state court.

When it is remembered that the focal issue in this controversy is: Which of two leases is valid—a Departmental oil and gas lease on restricted Indian lands of a restricted member of the Choctaw Nation, which lease is under Departmental supervision and over which such Departmental supervision has never been relinquished,—or a lease on the same lands over which the respondent has no supervision subsequently executed by a restricted Indian heir under County Court approval; and

When it is remembered that Title 28, U.S.C., Section 1331 (a) reads as follows:

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States"; and

When it is remembered that the amount in controversy is in excess of $10,000.00, exclusive of interest and costs; and

When it is pointed out that the petitioners in their brief, wherein they request a review by this Court, finally assert that this cause should be referred back to the Secretary of the Interior to dispose of this controversy;

We believe that the only question presented with respect to federal jurisdiction is *whether the same has been in this case properly invoked?*

2. Defendant's cross-claim invoked federal jurisdiction.

Under the Federal Rules of Civil Procedure, Rule 8 provides the method of pleading claims for relief. Subsection (a) thereof states that a pleading which sets forth a claim for relief, *whether an original claim, counterclaim, cross-claim, or third party claim, shall contain a short and plain statement of the grounds upon which the court's jurisdiction depends unless the court already has jurisdiction*, and such claim needs no new grounds for jurisdiction to support it.

Rule 12(b) provides that every defense in law or fact to a claim for relief whether a claim, counterclaim, cross-claim, or third party claim, shall be asserted in a responsive pleading, and subsection (h) of that rule provides that a party waives all defenses and objections which he does not present either by motion or answer.

Rule 13 provides in effect that claims arising out of the same transaction or occurrence, that is, the subject matter of the opposing party's claim, *must be affirmatively pleaded or they are waived, and in addition thereto permissive counterclaims are authorized, and provisions made for the bringing in of additional parties.*

When the complaint in this case was filed, the defendant realized that although the complaint did not so disclose on its face, that the action posed a federal question; to repeat, that the matters in such litigation involved were the respective rights of the plaintiffs under an oil and gas lease executed pursuant to the provisions of the Act of August 4, 1947 (61 Stat. 732), as against the rights of the defendant under an oil and gas lease executed prior

thereto by the restricted allottee under the Act of 1906 (34 Stat. 137) as amended, and which lease was approved by the Secretary of the Interior and over which lease he asserted jurisdiction.

This defendant, desiring to obtain a valid judgment in this case that would finally and effectually determine the rights of all parties, including the restricted Indian and the United States, immediately filed a motion to have Mary Belle Cooper now Chadwick made a party defendant herein. The court found that she was a necessary party and entered an order making her a party defendant. The opposing counsel made no objection to this procedure. The defendant then immediately filed its answer and cross-claim against the plaintiffs and against the restricted Indian defendant and notice was served on the United States as required by the Act of 1926. The answer and cross-claim of Pasotex in detail pleaded the facts which under the aforecited authorities show the jurisdiction and authority of the United States District Court, for the Eastern District of Oklahoma to entertain the suit and it asked for affirmative relief.

It is submitted that under these circumstances the United States District Court obtained jurisdiction over this controversy on *the basis of the cross-claim of Pasotex irrespective of whether or not plaintiffs' complaint disclosed or contained allegations sufficient to confer jurisdiction upon the court to begin with and irrespective of what happened to plaintiffs' case.*

In the case of *Manufacturers' Casualty Company v. Arapaho Drilling Co.*, 267 F.2d 5, the Tenth Circuit had the converse of the situation here before the Court under

consideration and in approving the rule that if the counterclaim asserts (independent of the main claim) grounds upon which federal jurisdiction can be sustained, used the following language:

> "In support of its contention that the trial court erred in not allowing a determination of the issues presented by the counterclaim, the appellant points out that plaintiff Campbell had no interest in the outcome of those issues; that, after dismissal of plaintiff Campbell's action diversity jurisdiction existed independently in the counterclaim; and that declaratory relief may be granted by way of counterclaim. And indeed it seems well settled that where a jurisdictional basis exists for a counterclaim it may sometimes be considered though the complaint fail for want of jurisdiction. Such was the background in *Isenberg* v. *Biddle*, 75 U.S. App. D.C. 100, 125 F.2d 741, 743, where summary judgment was granted on the counterclaim although the complaint was dismissed for 'want of jurisdiction,' and the Court of Appeals affirmed, stating:
>
> > "* * * Counsel insists that when the bill of complaint was dismissed, "the keystone of the District Court's jurisdiction fell and the counterclaim should have been dismissed with the bill." *Moore* v. *New York Cotton Exch.*, 270 U.S. 593, 607-609, 46 S.Ct. 367, 70 L.Ed. 750, 45 A.L.R. 1370, and *Kelleam et al.* v. *Maryland Casualty Co.*, 312 U.S. 377, 61 S.Ct. 595, 85 L.Ed. 899 are cited to sustain this position. In the last-named case, Justice Douglas, speaking to the facts in that case, said that once the bill of complaint was dismissed no jurisdiction remained for any grant of relief under the cross petition. But in that case there was no jurisdictional basis for the counterclaim independent of the main action. In the *Moore* case, the

dismissal of the main bill was not for want of jurisdiction; and the court refused to dismiss the counterclaim. Though it is suggested by Professor Shulman that it is implicit in the case that, if a plaintiff's action is dismissed for want of jurisdiction, the counter-claim falls, he adds that this is so only if there is no independent jurisdictional basis for the counter-claim. 45 Yale L.J. 393, 413. Here there is such independent basis and the rule is that in such circumstances, when the counterclaim seeks affirmative relief, it is sustainable without regard to what happens to the original complaint. *Lion Mfg. Corporation* v. *Chicago Flexible Shaft Co.*, 7 Cir., 106 F.2d 930, 933; *Vidal* v. *South American Securities Co.*, 2 Cir., 276 F. 855, 874; *Jackson* v. *Simmons*, 7 Cir., 98 F. 768 * * *."

"And in the case of *Switzer Brothers, Inc.* v. *Chicago Cardboard Co.*, 7 Cir., 252 F.2d 407, 410, the rule is thus formalized:

> 'It appears to be settled that where a counterclaim states a cause of action seeking affirmative relief independent of that stated in the complaint the dismissal of the complaint does not preclude a trial and determination of the issues presented by the counterclaim.'

"(4) But it is apparent in those exceptional cases where a counterclaim may survive the jurisdictional failure of a complaint that at least three premises must exist. Jurisdiction must exist within the scope of the allegations of the counterclaim; the claim made in the counterclaim must be independent of that made in the main case; and, lastly, affirmative relief must be sought. We are convinced the instant counterclaim falls far short of meeting these requirements."

Also, see *Isenberg* v. *Biddle*, 125 F.2d 744; *Piochi Mines, etc.* v. *Fidelity Philadelphia, etc.*, 206 F.2d 836; *Doby* v. *Doby*, 232 F.2d 504; *Montgomery Ward* v. *Collins*, 268 F.2d 830.

The cases relied on by petitioners are in the main diversity cases and their inapplicability to a situation such as here present are in cited cases clearly pointed out. *If the counterclaim independent of the petition presents a case of federal jurisdiction, jurisdiction has been properly invoked.*

3. The conclusion that the departmental lease had been extended is in accord with applicable law both federal and local.

Under numerical paragraphs 3, 4 and 6 of Section VI of the petition, petitioners argue that the laws of Oklahoma must give way to federal law in its determination of the issues involved. Under the provisions of Title 28, U.S.C. 1652, the laws of the State of Oklahoma and the decisions of its court, except where the Constitution or treaties of the United States or acts of Congress otherwise require or provide, are made the rules or decisions in civil actions in the courts of the United States in cases where they apply.

There is no principle better established and more uniformly adhered to by this Court than that the courts of the United States in deciding on titles to real property in the different states are bound to decide precisely as the state courts ought to do *where the Constitution, treaties or statutes of the United States do not otherwise provide.* See *Hyde* v. *Vattier*, 5 Peters 398, 8 L. Ed. 168.

"It is well settled that a conveyance by the United States of land which it owns beneficially or, as in this case, for the purpose of exercising its guardianship over Indians, is to be construed, in the absence of any contrary indication of intention, according to the law of the State where the land lies." *United States* v. *Oklahoma Gas & Electric Co.*, 318 U.S. 206, 87 L. Ed. 716. Also see *Grand Rapids & I.R. Co.* v. *Butler*, 159 U.S. 87, 40 L. Ed. 85, 15 Sup. Ct. 991; *Whitaker* v. *McBride*, 197 U.S. 510, 49 L. Ed. 875, 25 Sup. Ct. 530; *Oklahoma* v. *Texas*, 258 U.S. 574, 595, 596, 66 L. Ed. 771, 780, 781, 42 Sup. Ct. 406; see *Brewer-Elliott Oil & Gas Co.* v. *United States*, 260 U.S. 77, 88, 89, 67 L. Ed. 140, 146, 147, 43 Sup. Ct. 60; *United States* v. *Oregon*, 295 U.S. 1, 28, 29, 79 L. Ed. 1267, 1281, 55 Sup. Ct. 610; cf. *Jackson County* v. *United States*, 308 U.S. 343, 84 L. Ed. 313, 60 Sup. Ct. 285.

The Departmental oil and gas lease here involved in words provided that it should be in effect for a term of ten years and as long thereafter as oil or gas is produced from the lands involved. It had no provision inserted therein as to what was meant by oil and gas in paying quantities. It had no provision therein that required the completion of a well prior to the expiration of the primary term. *It had no provision that it would terminate if a well was not completed prior to the expiration of the primary term.* It did provide that the lessee might commence such wells during the term of the lease as lessee might see fit to commence, and under Oklahoma law, such lease was a commencement lease and not a completion lease (*State of Okla. ex rel Commissioners* v. *Carter*, 336 P.2d 1086) and if drilling were commenced during the primary term

the lease was perpetuated for as long as those operations were carried on and if they resulted in production, as long as oil or gas was thereafter produced (*Simons* v. *McDaniel*, 7 P.2d 419).

In the trial court and in the Court of Appeals, petitioners relied on the applicability of the Oklahoma law to the situation here involved. The opinion of the Court of Appeals in this case shows that it was properly applied and there is no rule, regulation or federal statute providing or specifying otherwise which prevents the substantive law of Oklahoma from being applicable to and controlling in the controversy here involved on the question of whether or not the lease herein was perpetuated in accordance with its terms and conditions.

This rule has been heretofore applied with respect to Departmental oil and gas leases on restricted lands and subject to Departmental supervision. *Magnolia Petroleum Company* v. *Wilson*, 215 F.2d 317, and *Sadler, et al.* v. *Public National Bank*, 172 F.2d 870.

In *Sperry Oil and Gas Company* v. *Chisholm*, 264 U.S. 488, 68 Law Ed. 803, there was involved a situation where a restricted Indian ratified an oil and gas lease covering restricted lands and other lands from which restrictions had been removed. The lands constituted his homestead under Oklahoma law. Under the Oklahoma law the signature of his wife was required to effectively lease the homestead. She did not execute. The federal law did not call for her signature as to restricted lands. This Court determined that the ratification was valid as to the restricted lands and invalid as to the lands on which restrictions had been removed.

4. The opinion decides no new questions and has no public importance or significance.

The authorities hereinbefore noted sustain the conclusion that the opinion here has decided no new questions of state or federal law and petitioners' argument of the importance of the opinion in the claim that it will adversely affect hundreds of existing oil and gas leases not only in Oklahoma but in other states as well covering thousands of acres under lease and will cause an identical lease in Kansas to be construed in a different manner from the same lease in New Mexico, Montana, Ohio or Texas, is unsound and without substance.

When attention is directed to the point that the petitioners have given no consideration whatsoever to *the fact that there could be no oil and gas lease on a Choctaw Indian's restricted land located in Kansas and, therefore, subject to Kansas law, or located in Texas and, therefore, subject to Texas law, or located in New Mexico and subject to New Mexico law, or located in Montana and subject to Montana law, or located in Ohio and subject to Ohio law, because the only restricted lands of these members of the Five Civilized Tribes are in Oklahoma*, the argument is without basis.

It is further to be noted that the particular form of lease which is specified to be used in the leasing of restricted lands of members of the Five Civilized Tribes is set out in Title 25 C.F.R., 174.1, *et seq., and it is noted, that these leases and regulations apply only to and are limited to members of the Five Civilized Tribes in Oklahoma.* And in the same volume of that code many various types of oil and gas leases and regulations prescribed with

respect to the leasing of the lands of other Indians and or tribes are set out and separate rules and regulations with respect thereto appear in said Title 25 C.F.R., as follows: (a) 171.1 *et seq.*—certain allotted lands of other Indians as therein specified; (b) 172.1 *et seq.*—reservation lands of the Crow Indians; (c) 173.1 *et seq.*—Osage Reservation lands in Oklahoma; (d) 175.1 *et seq.*—Quapaws; and others not necessary to note. Each set of these regulations with respect to leasing requirements is specific as to the particular tribe or Indians involved and no two of them are identical. And so far as government lands are concerned, they are handled under entirely different setups.

If it had been intended that all government lands and all Indian lands over which the government exercised supervision were to be leased on the same terms this multitude of different leasing rules and regulations would not have been set up.

5. The acts culminating in the new lease were in no way subject to or under the jurisdiction, authority or control of the Secretary of the Interior.

This controversy cannot be disposed of by administrative action. Petitioners in concluding their argument state:

> "In this case, however, the Secretary first *exercised* his discretionary authority and approved an oil and gas lease to the Respondent covering lands under his supervision. Ten years later, he *again exercised* his discretion and permitted the Petitioners to purchase a new lease which included the *same* acreage previously covered by Respondent's lease. Under such circum-

stances, the regulations conferred upon the Secretary not only the jurisdiction, but the duty to dispose of this controversy, and this case should be dismissed and remanded to him for that purpose."

At page 21 of the petition, it is emphasized that the petitioners' lease "was obtained at a judicial sale as a result of action by the Department of Interior in permitting such lease to be advertised for competitive bidding." And it is stated, "It should be emphasized that the County Court of Love County, Oklahoma, who sold the lease to Petitioner Klabzuba, *was acting as a "federal agency" for the Department. Parker* v. *Richard*, 250 U.S. 235, 63 L. Ed. 954; *United States* v. *Gypsy Oil Company*, 10 F.2d 487, 492 (10th Cir. 1925). Such authority was conferred upon it directly by the Congress, Section 9, 61 Stat. 731. Moreover, the Department had *absolute discretion* as to whether this new lease should have been advertised for bidding."

The above statements with respect to the authority, discretion and acts of the Secretary of the Interior, *concerning the lease executed by the restricted heir and approved by the County Court and under which petitioners claim title, are incorrect.* Such statements ignore and overlook the fact that the leasing by a restricted Indian of his restricted, allotted land must be approved by the Secretary of the Interior and the resulting lease is a Departmental lease such as is owned by respondent (Appendix "B"). *An entirely different method of leasing and approval by an entirely different agency and the application of entirely different provisions of law apply for the leasing for oil and gas purposes of a restricted Indian heir's inherited, re-*

stricted lands. Such a lease must be approved by the County Court (See Appendix "C").

The Departmental lease here involved was executed pursuant to the provisions of the Act of 1906, as amended (Appendix "B"). The lease upon which the petitioners rely was executed by the restricted Indian heirs pursuant to the provisions of the Act of 1947 (See Appendix "C"). There were two agencies set up by Congress by these two Acts with respect to the leasing of restricted Indian lands. Each was independent of the other. The Departmental lease was executed and its validity was dependent upon the approval of the Secretary of the Interior and the Secretary of the Interior still recognizes that lease to be valid and subsisting and in accordance with its terms has supervision over operations thereunder. The other lease was executed by the restricted Indian heir of her own volition, but was subject to be sold at competitive bidding and its validity was dependent upon such a sale and approval through the County Court. The Department of Interior had no authority whatsoever with respect to the leasing of the land by the restricted Indian heir and has no jurisdiction or supervision over such lease. *Parker* v. *Richards*, *supra*, and *United States* v. *Gypsy Oil Company* point this out: No administrative agency is vested with jurisdiction to settle this controversy. Respondents' title could in no way be cleared and quieted against the claims of the petitioners except by litigation.

V

CONCLUSION

We feel that the record in this case conclusively shows that the decision of the Court of Appeals herein is not in conflict with the decision of any other Court of Appeals on the same matter; likewise, the decision in no way has decided an important state or federal question. Nor has any federal question been decided in a way in conflict with the applicable decisions of this Court. As heretofore pointed out, there are no special and important reasons why a review of the decision of the Court of Appeals should be had by this Court and when the matters reflected by this record are tested by the considerations prescribed by this Court governing review on *certiorari*, and for all of the foregoing reasons, the Petition for the Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX "A"

Act of 1906

"§20. That after the approval of this Act all leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads, of full-blood allottees of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes shall be in writing and subject to approval by the Secretary of the Interior and shall be absolutely void and of no effect without such approval: Provided, That allotments of minors and incompetents may be rented or leased under order of the proper court: Provided further, That all leases entered into for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory." 34 Stat. 137.

APPENDIX "B"

Act of 1908

"§2. That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult, or by guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal: Provided, That leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and

regulations provided by the Secretary of the Interior and not otherwise: And provided further, That the jurisdiction of the probate courts of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions, and the term minor or minors, as used in this Act, shall include all males under the age of twenty-one years and all females under the age of eighteen years." 35 Stat. 312.

APPENDIX "C"

Act of 1947

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all restrictions upon all lands in Oklahoma belonging to members of the Five Civilized Tribes, whether acquired by allotment, inheritance, devise, gift, exchange, partition, or by purchase with restricted funds, of whatever degree of Indian blood, and whether enrolled or unenrolled, shall be, and are hereby, removed at and upon his or her death: Provided, (a) That except as provided in subdivision (b) of this section, no conveyance, including an oil and gas or mineral lease, of any interest in land acquired before or after the date of this Act by an Indian heir or devisee of one-half or more Indian blood, when such interest in land was restricted in the hands of the person from whom such Indian heir or devisee acquired same, shall be valid unless approved in open court by the county court of the county in Oklahoma in which the land is situated; (b) that petition for approval of conveyance shall be set for hearing not less than ten days from date of filing, and notice of hearing thereof, signed by the county judge, reciting the consideration offered and a description of the land shall be given by publication in at least one issue of a newspaper of general circulation in the

county where the land is located and written notice of such hearing shall be given to the probate attorney of the district in which the petition is filed at least ten days prior to the date on which the petition is to be heard. The grantor shall be present at said hearing and examined in open court before such conveyance shall be approved, unless the grantor and the probate attorney shall consent in writing that such hearing may be had and such conveyance approved in the absence of the grantor, and the court must be satisfied that the consideration has been paid in full. Proceedings for approval of conveyances by restricted heirs or devisees under this section shall not be removable to the Federal courts; (c) the evidence taken at the hearing shall be transcribed and filed of record in the case, the expense of which, including attorney fees and court costs, must be borne by the grantee. The court in its discretion, when deemed for the best interest of the Indian, may approve the conveyance conditionally, or may withhold approval; (d) that at said hearing competitive bidding may be had and a conveyance may be confirmed in the name of the person offering the highest bid therefor or when deemed necessary the court may set the petition for further hearing; (e) that the probate attorney shall have the right to appeal from any order approving conveyances to the district court of the county in which the proceedings are conducted within the time and in the manner provided by the laws of the State of Oklahoma in cases of appeal in probate matters generally, except that no appeal bond shall be required; * * *" 61 Stat. 732.

APPENDIX "D"

Act of 1926

Sec. 3. Any one or more of the parties to a suit in the United States courts in the State of Oklahoma or in the State courts of Oklahoma to which a restricted member of the Five Civilized Tribes in Oklahoma, or the restricted heirs or grantees of such Indian are parties, as plaintiff, defendant, or intervenor, and claiming or entitled to claim title to or an interest in lands allotted to a citizen of the Five Civilized Tribes or the proceeds, issues, rents, and profits derived from the same, may serve written notice of the pendency of such suit upon the Superintendent for the Five Civilized Tribes, and the United States may appear in said cause within twenty days thereafter, or within such extended time as the trial court in its discretion may permit, and after such appearance or the expiration of said twenty days or any extension thereof the proceedings and judgment in said cause shall bind the United States and the parties thereto to the same extent as though no Indian land or question were involved. Duplicate original of the notice shall be filed with the clerk of the court in which the action is pending and the notice shall be served on the Supreintendent for the Five Civilized Tribes or, in case of his absence from his principal office, upon one of his assistants, and shall be served within ten days after the general appearance in the case of the party who causes the notice to be issued. The notice shall be accompanied by a certified copy of all pleadings on file in the suit at the time of the filing of the duplicate original notice with the clerk and shall be signed by the party to the action or his or her counsel of record and shall be served by the United States marshal and due return of service made thereon, showing date of receipt and service of notice. If notice is not served within the time herein specified, or if re-

turn of service thereof be not made within the time allowed by law for the return of service of summons, alias notices may be given until service and return of notice is had and in no event shall the United States be bound unless written notice is had as herein specified: Provided, That within twenty days after the service of such notice on the Superintendent for the Five Civilized Tribes or within such extended time as the trial court in its discretion may permit the United States may be, and hereby is, given the right to remove any such suit pending in a State court to the United States district court by filing in such suit in the State court a petition for the removal of such suit into the said United States district court, to be held in the district where such suit is pending, together with the certified copy of the pleadings in such suit served on the Superintendent for the Five Civilized Tribes as hereinbefore provided. It shall then be the duty of the State court to accept such petition and proceed no further in said suit. The said copy shall be entered in the said district court of the United States within twenty days after the filing of the petition for removal and the defendants and intervenors in said suit shall within twenty days thereafter plea, answer, or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in said district court, and such court is hereby given jurisdiction to hear and determine said suit, and its judgment may be reviewed by certiorari, appeal, or writ of error in like manner as if the suit had been originally brought in said district court." 44 Stat. 239.